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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

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NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC.,
*Petitioner*,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO, *et al.*,
*Respondents.*

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**On Petition for Leave to Intervene and Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

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## BRIEF IN OPPOSITION

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## BRIEF IN OPPOSITION

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The opinions below and the basis for this Court's jurisdiction are correctly described in the petition for leave to intervene and the petition for a writ of *certiorari*. Pet. 2.

## STATEMENT OF THE CASE

In the courts below, this was a case brought by nine employees of the State of Illinois challenging a "fair share" fee agreement between the State and the American Federation of State, County and Municipal Employees ("AFSCME" or "the Union"), covering the collective bargaining unit in which the employees worked.

Pet. App. 2a. After AFSCME made certain changes in its procedures for administering this agreement, and after an arbitration was held to determine the correctness of AFSCME's calculation of the fee (with the Union undertaking to make the plaintiffs whole in conformity with the arbitration decision), the district court entered judgment dismissing the plaintiffs' complaint. Pet. App. 3a-4a. The plaintiffs appealed this ruling, as well as the district court's denial of a preliminary injunction and that court's refusal to certify a class.

The court of appeals concluded that the preliminary injunction issue was moot, and affirmed the district court in every other respect. Pet. App. 12a. The plaintiffs have not sought review by this Court of the court of appeals decision on the merits, but one plaintiff (through his estate) has filed a *certiorari* petition suggesting mootness and asking that the court of appeals decision be vacated. *See* Petition for a Writ of *Certiorari* in *Estate of Jack Gilpin v. AFSCME*, Supreme Court No. 89-292.

The National Right to Work Legal Defense and Education Foundation ("the Foundation")—the petitioner here—funds, and through its staff attorneys litigates, legal challenges to fair share fee agreements. In this case, a Foundation staff attorney represented the plaintiffs in the court of appeals.

Three passages in the court of appeals' opinion referring to the Foundation—each of which is discussed in detail at pp. 3-7, *infra*—have given rise to this extraordinary Petition for Leave to Intervene and Petition for a Writ of *Certiorari*.[1]

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[1] The first passage is part of a long paragraph explaining the court of appeals' determination that "[a] potentially serious conflict of interest within the class precluded the named plaintiffs from representing the entire class adequately." Pet. App. 4a. The second passage concludes a paragraph in which the court of appeals explains why in the present context an alleged defect in AFSCME's

## ARGUMENT

The extraordinary petitions filed by the National Right to Work Legal Defense and Education Foundation are all sound and fury and no legal substance.

The Foundation, wearing its petulant indignation like a badge, protests that it "has been 'judicially mugged in the dark' . . . . ," and that its "reputation has been sullied, its integrity has been impugned, and its ability to aid employees in the exercise of their First Amendment rights through litigation has been jeopardized by the Court of Appeals' decision . . ." Pet. 8. According to the Foundation, the three passages in the court of appeals' opinion that constitute this crime amount to a factual finding that the Foundation is "evil," made without according the Foundation due process of law. Pet. 25. On that basis, the Foundation argues that this Court must "vacate the Court of Appeals' judgment as it applies to the Foundation . . . ." *Id.*

As we now show, it is perfectly plain that nothing in the cited portions of the court of appeals decision comes close to constituting judicial error much less to generating a legal claim worthy of this Court's time and attention. The Foundation's petitions should be denied.

1. The first and longest passage the Foundation finds objectionable reads as follows:

> The district judge was right not to certify the suit as a class action on behalf of the 10,000 nonunion members. A potentially serious conflict of interest within the class precluded the named plaintiffs from representing the entire class adequately. *See* Fed. R. Civ. P. 23(a)(4); *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756

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fair share fee notice does not justify a restitution remedy. Pet. App. 9a. The final passage is at the end of a paragraph rejecting the plaintiff's argument that AFSCME's fair share fee notice should have contained more detailed information. Pet. App. 11a-12a.

> F.2d 1261, 1284 (7th Cir. 1985). Two distinct types of employees will decline to join the union representing their bargaining unit. The first is the employee who is hostile to unions on political or ideological grounds. The second is the employee who is happy to be represented by a union but won't pay any more for that representation than he is forced to. The two types have potentially divergent aims. The first wants to weaken and if possible destroy the union; the second, a free rider, wants merely to shift as much of the cost of representation as possible to other workers, i.e., union members. The "restitution" remedy sought by the National Right to Work Legal Defense Foundation, which represents the nine named plaintiffs, is consistent with—and only with —the aims of the first type of employee. The Foundation is seeking repayment to *all* the bargaining unit's nonunion employees of the *entire* agency fees collected by the union in the 1985 and 1986 school years (with interest), even though the Foundation has not challenged the arbitrator's determination that the union was entitled to *more* than the amount it actually collected in 1985 and to 99 percent of the amount it collected in 1986. Not only would the "restitution" that the Foundation seeks confer a windfall on nonunion employees but it might embarrass the union financially. Yet those nonunion employees who, while not wanting to pay more (and perhaps even wanting to pay less) than their "fair share" fees, have no desire to ruin the union or impair its ability to represent them effectively might not want so punitive a remedy. The National Right to Work Foundation is not an adequate litigation representative of those employees. . . . [Pet. App. 4a-5a.]

The first six sentences in this discussion of the class action issue—which state the governing legal rule on certifying a class where there is a potentially serious conflict within the class and which delineates the two analytically distinct types of nonmember fair share fee

payers who have potentially divergent aims—*do not even mention the Foundation* and cannot possibly give rise to any legal claim by the Foundation in its own name. And those sentences are more than sufficient in themselves to support the holding and judgment below: *viz.*, that "the district court was right not to certify the suit as a class action."

The remainder of the passage merely provides a concrete illustration of how this inherent conflict may manifest itself. The Foundation's attack on these six sentences is utterly vacuous. The most straightforward way of demonstrating that much is to substitute the long cumbersome phrase "the named plaintiffs in this case represented by a National Right to Work Legal Defense Foundation staff attorney" for what is obviously the court of appeals' shorthand for that phrase:

> The "restitution" remedy sought by the [named plaintiffs in this case represented by a National Right to Work Legal Defense Foundation staff attorney] is consistent with—and only with—the aims of the first type of employee. The [named plaintiffs in this case represented by a National Right to Work Legal Defense Foundation staff attorney are] seeking repayment to *all* the bargaining unit's nonunion employees of the *entire* agency fees collected by the union in the 1985 and 1986 school years (with interest), even though the [named plaintiffs in this case represented by a National Right to Work Legal Defense Foundation staff attorney have] not challenged the arbitrator's determination that the union was entitled to *more* than the amount it actually collected in 1985 and to 99 percent of the amount it collected in 1986. Not only would the "restitution" that the [named plaintiffs in this case represented by a National Right to Work Legal Defense Foundation staff attorney seek] confer a windfall on nonunion employees but it might embarrass the union financially. Yet those nonunion employees who, while not wanting to pay more (and perhaps

> even wanting to pay less) than their "fair share" fees, have no desire to ruin the union or impair its ability to represent them effectively might not want so punitive a remedy. The [named plaintiffs in this case represented by a National Right to Work Legal Defense Foundation staff attorney are] not an adequate litigation representative of those employees. . . . [Pet. App. 4a-5a.]

Plainly this bowdlerized version is both identical to the original in legal effect and unassailable by even an organization as sensitive to blunt, fair comment as the Foundation shows itself to be.

That being so, unless this Court is to assume the role of a pedantic instructor marking court of appeals opinions for propriety of expression, there is nothing in the class action part of this case warranting further review.

We treat with the next two mentions of the Foundation together. In the midst of a lengthy discussion of the propriety of requiring AFSCME to refund all fair share fees collected from the named plaintiffs, Pet. App. 5a-10a, the court of appeals turned to the adequacy of AFSCME's fair share fee notice as amended to conform to the district court's instructions and said:

> Is this an improvement? Is it the constitutional *minimum*, as the district court thought? It is more informative, but also longer and more complex. It may invite a few more challenges, but so what? The arbitrator will order a refund to all union nonmembers who are overcharged, whether or not they file a challenge; so only one challenger is necessary. And there will always be at least one whether or not the notice is informative; the National Right to Work Foundation will see to that, you can be sure. [Pet. App. 9a.]

Later, in a further discussion of the legal adequacy of AFSCME's fair share fee notice, the court of appeals added:

> Since mounting a challenge is for all practical intents and purposes free and since only one challenge is necessary to obtain a refund for all nonunion employees, we cannot see the point in requiring the union to provide even more information than the district judge required. In objecting to the notice, the plaintiffs and the National Right to Work Foundation are merely trying to hamstring the union. [Pet. App. 11a-12a.]

Neither of these passages can possibly be characterized as an appellate finding of fact made without due process of law. The first is a mere prediction as to what the Foundation is likely to do; the second is nothing more than a statement of opinion. Both are asides in the course of the court of appeals' full legal analysis of the issues raised. Neither is critical to its determination to affirm the district court. And, of at least equal importance, neither is any part of the court of appeals judgment below which states simply:

> The appeal is dismissed insofar as it challenges the denial of the plaintiffs' motion for a preliminary injunction. Otherwise the judgment is affirmed. Costs in this court to the defendants. [Pet. App. 12a.] [2]

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[2] The court of appeals formal judgment entered the same day as the decision below reads:

> This cause was head on the record from the United States District Court for the Central District of Illinois, Springfield Division, and was argued by counsel.
>
> On considerations whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED IN PART, DISMISSED IN PART, with costs in this court to the defendants, in accordance with the opinion of this Court filed this date.

While the foregoing is not reproduced in the *certiorari* petition appendix in this case, the judgment is set out at p. 35a of the *certiorari* petition in *Estate of Jack Gilpin v. AFSCME, et al.*, Supreme Court No. 89-292 (which as explained above grows out of the same court of appeals proceeding).

The Foundation, of course, does not—and cannot—challenge a word in that passage. That being so, these petitions must be denied.

2. While the foregoing is, we believe, legally sufficient, we add a few words to put this matter in context. In this Court, the Foundation strikes a jose of injured innocence, which rests on the pretence that neither the organization itself nor its staff attorney were major factors in determining what legal theories were—and were not—pursued in this litigation. The papers in this Court indicate otherwise.

As these petitions demonstrate, the Foundation is so anxious to vacate the court of appeals decision here that it has filed extraordinary papers in its own name seeking that result. In a parallel development—that it is difficult to believe is a mere coincidence—a Petition for a Writ of *Certiorari* in *Estate of Jack Gilpin v. AFSCME, et al.*, Supreme Court No. 89-292, has been filed seeking to vacate the decision below as moot. Mr. Gilpin's estate is represented by the same Foundation staff attorney who represented the named plaintiffs in the court of appeals.

In its attempt to moot this case, the *Gilpin certiorari* petition writes off most of the lead plaintiff's damage claim; asserts that the notice of appeal filed below was ineffective to preserve eight of the named plaintiffs' claims (even though neither the court of appeals nor the defendant Union has suggested that, and even though there is a substantial argument that the notice was effective); and, without a word of explanation, abandons the claims of the proposed class. *See* Brief In Opposition in *Estate of Jack Gilpin v. AFSCME, et al.*, Supreme Court No. 89-292, at pp. 4-8.

Even from our standpoint, it would not appear in the interest of the lead plaintiff's estate to write off most of its damage claims. Nor does it appear in the interest of the other named plaintiffs to assert that they have no right to seek further review of the decisions below be-

cause they did not effectively appeal the judgment dismissing their complaint. And, if the plaintiffs were right below, and the proposed class should have been certified, it is surely not in the interests of the class members to undermine their right to petition this Court for review of the denial of class certification by acquiescing in a questionable mootness argument.

* * * *

In sum, the named plaintiffs represented by the Foundation through one of its staff attorneys advanced an extreme position in the court below. That court spoke directly and firmly—but not intemperately—in rejecting that position. The Foundation should not be allowed to advance its institutional litigation interest by having the decision below depublished.

## CONCLUSION

The petition for leave to intervene should be denied; in the alternative, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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